IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

JIMMY WEAVER, ET AL.	§	
Vs.	§	9:92cv88
EMPLOYER'S	§	
UNDERWRITERS, INC.,	§	
ET AL.	§	

MEMORANDUM OPINION AND ORDER

On this day came on to be considered the Plaintiffs' Motion to Remand. After careful consideration, the Court is of the opinion that the following order should issue.

I. FACTS

This is a case brought by a worker and his wife against his employer (Rodrigues), the insurance carrier with whom Rodrigues had contracted to cover his workers with disability and accident insurance (Employer's Underwriters, Incorporated), and an insurance adjuster who worked for the carrier (Lisa Elliot). The plaintiff originally filed this case in a Texas state district court, alleging that he was severely injured and disabled while working for Rodrigues. After the accident, the plaintiffs assert, Lisa Elliot ("Elliot") deceived them regarding the extent of their coverage and misled them into executing a settlement and release agreement. The plaintiffs --further allege that Employer's Underwriters, Incorporated ("Employer's") reasonable medical and disability benefits due under the insurance plan issued by Employer's to Rodrigues.

Based upon the above allegations, the plaintiffs bring various

pure state law causes of action[1]. Based upon these causes of action, the plaintiffs seek actual damages based upon benefits which are due under the terms of the insurance plan, damages for mental suffering, treble damages under the DTPA, additional damages under Article 21.21 of the Texas Insurance Code, punitive damages, attorneys' fees and costs, and pre-judgment interest. Employer's and Elliot's original answer contains a general denial. Rodrigues's original answer denies that he is a "person" as defined in the Texas Insurance Code, that he has any connection with the business of insurance, that an contract exists which would allow the recovery of attorneys' fees under Texas law, denies that applicable notice requirements have been met, and generally denies the plaintiffs' allegations.

The defendants have removed this case to this Court, asserting that the insurance plan which is the basis of the plaintiffs' claims is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002, *et seq.*, and that the plaintiffs' claims on the whole regard alleged unfair claims settlement practices on the part of the defendants. As a result, assert the defendants, this Court has jurisdiction under 28 U.S.C. § 1331, and the case may be removed according to 28 U.S.C. § 1441(b).[2] In response, the plaintiffs assert that Rodrigues has attempted to sidestep the Texas Worker's Compensation system "through the artifice of an ERISA plan,"[3] that "[t]his case does not substantively involve an ERISA plan, "[4] and that any causes of action alleged by the plaintiffs would exist even in the absence of ERISA. In response, the defendants

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[1] These causes of action are detailed in the discussion below.

[2] It is undisputed that there is no diversity of citizenship between the parties, and thus that a federal question is the only basis for this Court to assert subject matter jurisdiction. Thus, only if the plan in this case is an ERISA plan and the plaintiffs' claims (or some of them) are preempted by ERISA does this Court have subject matter jurisdiction.

[3] Pl. Mot. to Remand P. 2.

[4] *Id.*

assert that the insurance program at the heart of the plaintiffs' claims is an ERISA plan, thus giving this Court jurisdiction, and that the plaintiffs' claims are either preempted or that the Court has pendent jurisdiction over the non-preempted state law claims.

The instant motion gives rise to four substantive questions: (1) does this Court have jurisdiction over this case (i.e., is the insurance plan in question governed by ERISA)? (2) if the Court does have jurisdiction, are any of the plaintiffs' claims preempted by ERISA? (3) if any of the plaintiffs' claims are preempted, are the plaintiffs within the class of persons or entities entitled to bring an action under ERISA? (4) what is the proper disposition of this case, based upon the findings to the above issues? The Court addresses these issues in order below.

II. SUBJECT MATTER JURISDICTION

A. Statutory Framework

The first question to be addressed in this case is whether or not the Court has subject matter jurisdiction over this case via ERISA and the federal question statute. In order for this Court to have jurisdiction, it must first find that ERISA applies to the insurance plan issued by Employer's and purchased by Rodrigues.[5] This question was directly addressed by the United States Court of Appeals for the Fifth Circuit in the case of Hansen v. Continental

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[5] It is clear that, if the Employer's insurance plan governed by ERISA, the case may be removed by the defendants to this Court despite the lack of a substantive federal question on the face of the plaintiffs' pleadings. See Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) (holding that "Congress has clearly manifested an intent to make causes of action within the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court" despite the lack of a federal claim within the plaintiff's pleadings. Id. at 66.) It is clear that diversity of citizenship jurisdiction does not exist in this case.

Insurance Company.[6] In Hansen, the court set out a procedure for courts to follow, based upon the statutory framework of ERISA, in determining whether or not a particular insurance plan is governed by ERISA. In this analysis, the following questions must be addressed: (1) does an insurance plan exist? (2) if so, is that plan excluded from ERISA preemption by Department of Labor regulations? (3) if a plan exists but is not excluded, does the plan meet the definition of an employee benefit welfare plan fashioned by the Fifth Circuit?

B. Existence of a Plan

In determining whether or not an insurance plan exists, the Court is guided by the test first laid out by the Eleventh Circuit in Donovan v. Dillingham:[7] "[i]n determining whether a plan, fund or program...is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.[8] Attached as Exhibit "A" to the defendants' Response to Motion to Remand is the Southeastern Lumbermen's Association Employee Benefit Plan (the insurance plan in question).[9]

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[6] 940 F.2d 971 (5th Cir. 1991). This test is cited with approval in Meredith v. Time Ins. Co., 980 F.2d 382 (5th Cir. 1993.

[7] 688 F. 2d 1367 (11th Cir. 1982) (en banc). The Fifth Circuit adopted this test in Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 240 (5th Cir. 1990).

[8] Donovan, 688 F.2d at 1373; see also Hansen, 940 F.2d at 977 (quoting Donovan test).

[9] The Court notes that the Southeastern Lumbermen's Association Employee Benefit Plan appears to be a Multi-Employer Welfare Association ("MEWA"). 29 U.S.C. § 1002(40)(A). This finding, however, has no impact upon the Court's analysis of ERISA applicability. MDPhysicians & Associates, Inc. v. State Board of Ins., 957 F.2d 178, 181 (5th Cir.), cert.

By reading this document, a reasonable person could determine the intended benefits (accidental death and dismemberment and disability),[10] the beneficiaries (all employees working at least one hour a week--defined as covered employees in the plan),[11] the source of financing (employer pays initial contribution and periodic premiums)[12] and procedures for receiving benefits (employee turns in claim to and consults with Employer's).[13] Thus, the Court finds that an insurance plan exists in this case.

C. Exclusion by Regulation

Although an insurance plan may exist legally, it may be excluded from coverage by Department of Labor Regulations: "if the...plan meets the criteria set forth in the Department of Labor regulations, then ERISA does not cover that plan, and the inquiry is ended.[14] These regulations provide that the ERISA term "employee welfare benefit plan"

> shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
> (1) No contributions are made by an employer

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denied, 113 S.Ct. 179 (1992).

[10] Def. Resp. to Mot. to Remand Ex. "A" PP. 9-13.

[11] *Id.* P. 3.

[12] *Id.* P. 3, 6.

[13] *Id.* P. 7.

[14] Hansen, 940 F.2d at 976 (citing Kidder v. H & B Marine, Inc., 932 F.2d 347, 351 (5th Cir. 1991); Gahn v. Allstate Life Ins. Co., 926 F.2d 1449, 1452 (5th Cir. 1991)).

or employee organization;

(2) Participation [in] the program is completely voluntary for employees or members;

(3) The sole function of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

(4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.[15]

In order for a plan to be excluded from coverage, each of the above regulatory statements must apply.[16] This particular inquiry may be quickly concluded by noting that the insurance plan itself provides that the employer shall make all required contributions,[17] and the fact that all of Rodrigues's employees are required to join the plan

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[15] 29 C.F.R. 2510.3-1(j).

[16] Hansen, 940 F.2d at 977 (citing Kidder, 932 F.2d at 351; Gahn, 926 F.2d at 1452; Memorial Hospital, 904 F.2d at 241 n. 6)).

[17] Resp. to Mot. to Remand Ex. "A" P. 3. This fact is confirmed in Rodrigues's affidavit, in which he states that he makes all contributions due under the plan and that his employees make no payments. (Resp. to Mot. to Remand Ex. "B" PP. 1-2.)

upon employment.[18] Thus, the Court finds that a plan exists, and that it is not excluded from ERISA coverage by the Department of Labor regulations.

D. Fifth Circuit Test

Although an insurance plan may exist and not be excluded from ERISA coverage by the applicable regulations, the plan must also fall within the scope of ERISA before that statute will apply.[19] ERISA applies "to any employee benefit plan if it is established or maintained...by any employer engaged in interstate commerce or in any industry or activity affecting commerce.[20] ERISA defines an "employee welfare benefit plan" ("EWBP") as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise...medical, surgical, or hospital care or benefits, or benefits in the event of sickness,

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[18] Resp. to Mot. to Remand Ex. "B" P. 2.

[19] "Whether an ERISA plan exists is a question of fact." Gahn v. Allstate Life Ins. Co., 926 F.2d 1449, 1451 (5th Cir. 1991) (citing Wickman v. Northeastern Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir.), cert. denied, 111 S.Ct. 581 (1990)).

[20] 29 U.S.C. §1003(a)(1) (in pertinent part). There has been no contention by any party the Rodrigues is not engaged in interstate commerce or in an activity which affects interstate commerce.

accident, disability, death or unemployment.[21] There are thus two elements to this inquiry: "first, it [the plan] must be established or maintained by an employer, and second, the employer must have a certain intent--a purpose to provide benefits to its employees."[22]

1. Established or Maintained

In determining whether an employer has established or maintained an insurance plan, "'the court should [focus] on the employer..and [its] involvement with the administration of the plan.'"[23] In short, the court is required to find "some meaningful degree of participation by the employer in the creation or administration of the plan."[24] In this case, the defendants have pointed out the following as evidence of establishment or maintenance of the insurance plan: (1) Rodrigues (and not the employees) paid the initial and regular contributions toward the plan;[25] and (2) Rodrigues forwarded to Employer's the information required on each employee as they were hired.[26] The Fifth Circuit has stated that ERISA does not govern "'bare purchases of health insurance where...the purchasing

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[21] 29 U.S.C. § 1002(1) (in pertinent part). This definition includes both EWBPs and employee pension plans, only the former of which is applicable in this case. See 29 U.S.C. § 1002(3) (discussing the terms "employee benefit plan' and "plan" as used within ERISA).

[22] Hansen, 940 F.2d at 977.

[23] Hansen, 940 F.2d at 978 (quoting Gahn, 926 F.2d at 1452).

[24] Hansen, 940 F.2d at 978.

[25] Resp. to Mot. to Remand Ex. "A" PP. 3, 6; Ex. "B" PP. 1-2.

[26] Resp. to Mot. to Remand Ex. "A" P. 5; Ex. "B" P.2.

employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits.'"[27] The Fifth Circuit has also, however, held that when an employer's only connection with an insurance plan is the payment of premiums on behalf of his employees, that payment is "'substantial evidence that a plan, fund or program [was] established.'"[28]

Based upon the above reasoning, it is clear that the plan in this case was established or maintained by Rodrigues. Rodrigues was responsible for the initial and continuing contributions (premiums) under the plan, and for forwarding employee information to the plan administrator, Employer's. Rodrigues's lack of extensive administrative involvement in the plan may simply be seen as a desire to have Employer's administer and insure the plan.[29]

2. Purpose of Providing Benefits

In addition to the above, the employer must have had a purpose or intent to provide benefits to his employees. The Court finds that this element is met, first due to Rodrigues's assertion that he became a participant in order "to establish

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[27] Memorial Hospital, 904 F.2d at 242 (quoting Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208, 1211 (5th Cir. 1980), *cert. denied sub nom.* Taggarat Corp. v. Efros, 450 U.S. 1030 (1981)).

[28] Kidder, 932 F.2d at 353 (citing Donovan, 688 F.2d at 1373). In both Kidder and Memorial Hospital System, the only apparent connection between the employer and the insurance plan was the regular payment of premiums by the employer. In both cases, however the courts found that ERISA plans existed.

[29] See Memorial Hospital System, 904 F.2d at 243 (court stated that "[t]he fact that Noff's [the employer] administrative functions under the plan are minimal is perfectly in keeping with its intent that Northbrook [the plan administrator] administer the plan as well as insure it").

and maintain an Employee Benefit Plan pursuant to which certain medical benefits and disability benefits would be provided to all my employees for certain accidental injuries."[30] Secondly, the Southeastern Lumbermen's Association adopted the plan (which provides for disability and accident coverage) with the stated purpose of "creat[ing] an employee benefit plan for the benefit of eligible employees of participating members in the SLA."[31]

Based upon the fact that the Court has found above that an insurance plan exists in this case, that it is not excluded from ERISA coverage by Department of Labor regulations, and that it meets the criteria in the ERISA EWBP definition, the Court also finds that the plan involved is an ERISA plan.

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[30] Resp. to Mot. to Remand Ex. "B" P. 1.

[31] Resp. to Mot. to Remand Ex. "A" P. 2. The plaintiffs argue that Rodrigues's intent is not to benefit the employee, but to have an insurance plan to his detriment. This assertion is based upon the alleged meager nature of the Employer's plan benefits compared to those provided by the Texas statutory worker's compensation system. (Pl. Mot. Remand P. 2-3.) The Court finds that this argument is without merit, first because it is entirely legal for employers in Texas not to subscribe to the Texas worker's compensation system (in return for which they surrender certain common-law defenses). TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (Vernon 1967). Second, the Court finds that measuring the intent of the employer based upon what other potential benefits the employees might have received under another statutory or nonstatutory plan or program is illogical. To do so would mean that, as long as an employee could point out a plan with more benefits to the employee, the employer would be deemed not to have adopted an EWBP, regardless of the extent of benefits provided under the plan actually adopted by the employer. This argument is contrary to both the terms of the statute and the majority of the cases which have interpreted it.

III. PREEMPTION OF THE PLAINTIFF'S CLAIMS

A. Scope of Preemption Under ERISA

The broad preemption provision within ERISA states that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[32] Determining whether a particular cause of action is preempted is a matter of finding congressional intent, and in this vein the Supreme Court has noted "that the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan [and EWBP] regulation as exclusively a federal concern.'"[33] In interpreting the "relate to" language of the preemption clause, the Supreme Court has stated that the phrase is"given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'"[34] Further, "[t]he pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."[35]

In analyzing the above language, the Fifth Circuit has set forth two factors which unite cases finding that preemption applies:

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[32] 29 U.S.C. § 1144(a) (in pertinent part). There are express exceptions to the preemption clause, none of which apply in this case.

[33] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

[34] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 97 (1983)).

[35] Metropolitan Life Ins. Co., 471 U.S. at 39 (citing Shaw, 463 U.S. at 98-99)).

"(1) the state law claims address areas of exclusive federal concern such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship between the traditional ERISA entities--the employer, the plan and its fiduciaries, and the participants and beneficiaries."[36] The Fifth Circuit has noted that "[t]he determination that [an insurance plan] is an ERISA plan is tantamount to a determination that [the plaintiff's] state law causes of action are barred."[37]

B. The Plaintiffs' Claims in This Case

The plaintiffs bring the following claims in this case:

(1) against all three defendants under the Texas Deceptive Trade Practices Act ("DTPA") for false, misleading and deceptive practices in the course of settling Mr. Weaver's claim;

(2) against all defendants based upon the Texas Insurance Code Article 21.21, Section 16, alleging gross inadequacy of the settlement offer from Elliot and Employer's;

(3) constructive fraud on the part of all three defendants in making material, false representations which the plaintiffs relied upon during the course of the settlement talks;

(4) duress upon all the defendants' part in seeking to have the Weavers execute the release and settlement;

(5) bad faith against all three defendants, alleging that Jimmy Weaver was a third-party beneficiary of the insurance contract between Rodrigues and Employer's;

(6) conspiracy against all defendants in acting to deceive the plaintiffs and secure a settlement and release;

(7) negligence on Rodrigues's part in failing to provide a safe workplace and adequate tools;

(8) negligence on the part of Employer's and Elliot in

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[36] Memorial Hospital System, 904 F.2d 236 (citations omitted).

[37] Hansen, 940 F.2d at 979.

failing to treat the plaintiffs with good faith and fairness;

(9) gross negligence on the part of all the defendants in dealing with the plaintiffs; and

(10) attorney's fees based upon applicable provisions of the Texas Civil Practice and Remedies Code, the DTPA, and the Texas Insurance Code.

In analyzing the potential preemption of the plaintiffs' claims, the Court notes that the general character of the plaintiffs' state court petition is one seeking damages for unfair claims settlement practices. In essence, what the plaintiff alleges is that, in the course of determining the amount of benefits to which Mr. Weaver would be due, the defendants mislead the plaintiffs and misrepresented facts, causing the plaintiffs to execute release and settlement agreements.

C. Scope of Preemption in This Case

After careful consideration, the Court is of the opinion that all of the above causes of action, except for the negligence and gross negligence causes of action against Rodrigues alone forfailure to provide a safe workplace and adequate tools, and the claim for attorneys' fees on those causes of action, are preempted by ERISA.[38] In support of this finding, the Court notes under the Memorial Hospital System test that the claims first address an area of exclusive federal concern, i.e., whether a claim under an ERISA EWBP was properly processed and decided, and the peripheral actions of the claims adjuster, employer, and administrator of the plan in processing and deciding the fate of the claim. Congressional intent in enacting ERISA--a decisive factor in determining whether preemption applies--was largely to "protect the interests of employees and their beneficiaries in employee benefit plans."[39] By finding that

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[38] These non-preempted claims are found in paragraphs "E," "F," and "G" of the Plaintiffs' Original Petition.

[39] Memorial Hospital System, 904 F.2d at 247.

finding that preemption occurs in this case, the Court furthers the "advantages of a uniform set of regulations governing plan fiduciary responsibilities and governing procedures for processing claims and paying benefits."[40] Additionally, the Court notes that the claims in this case--all arising out of the manner in which the Weaver's claims for benefits were resolved--directly affect the relationship between the administrator of the plan (Employer's) and the employee. Due to the broad form of the allegations, those claims also implicate the employer, Rodrigues. Thus, the Court finds that the claims of the plaintiffs (aside from the Rodrigues negligence and gross negligence claim and the dependent attorneys' fee claim) are preempted under the analysis set forth in Memorial Hospital System.

In addition to the above, the Court notes the following cases in support of its finding: Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (individual plaintiff sued plan administrator alleging breach of contract and fiduciary duty and fraud in the inducement; court found that the claims were for improper processing of a claim and found preemption to apply); Hogan v. Kraft Foods, 969 F.2d 142, 144-145 (5th Cir. 1992) (former employee and wife sued employer and plan administrator based upon ERISA, breach of contract, Texas Insurance Code Art. 21.21, the DTPA, breach of good faith and fair dealing, negligence, and intentional infliction of emotional distress, alleging that their rights under the plan had been denied; court found that all the state law claims were based upon the failure of the plan to make a payment and were preempted); Ramirez v. Inter-Continental Hotels, 890 F.2d 760, 764 (5th Cir. 1989) (individual plaintiff sued to recover benefits he alleged were improperly denied based upon, *inter alia,* the Texas Insurance Code Article 21.21; court found the provision preempted); Boren v. N.L. Industries Inc., 889 F.2d 1463, 1466 (5th Cir. 1989)(individual plaintiff sued employer and plan administrator to recover benefits based upon breach of contract, the DTPA, negligence and the Texas Insurance Code; court found preemption based upon the fact that plaintiff was "relying on state law to advance his complaint that his

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[40] ID. at 245.

benefits under the plan were terminated"); Cefalu v. B. F. Goodrich Co., 871 F.2d 1290, 1295 (5th Cir. 1989) (individual plaintiff sued employer based oral representations regarding the extent of benefits under a pension plan; court held that the damages would necessarily be measured by the terms of the benefit plan and that the breach of contract claim was preempted).[41]

In contrast to the above, the Court finds that the plaintiffs' claims regarding the negligence of Rodrigues in failing to provide a safe place to work and adequate equipment, and gross negligence in those actions, and seeking attorney's fees for those legal claims, are not preempted. In contrast to the above (preempted) claims, these state law claims have no relation to the EWBP in issue, and could be brought even if no insurance plan existed at all. Thus, these are the sole state law claims to survive preemption in this case.

IV. A PROPER PLAINTIFF

A. Proper Plaintiffs Under ERISA

Having found that the plaintiffs' state law claims are largely preempted under ERISA, the next inquiry is whether or not the plaintiffs have standing to sue under ERISA. ERISA itself provides that there are four types of plaintiffs who may bring a civil enforcement action: participants, beneficiaries, the Secretary, or a

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[41] The Court would note that "ERISA's preemption provision bars state law causes of action even though such preemption may leave a victim of fraud or misrepresentation without a remedy." Hansen, 94Q -F.2d at 979 (citing Lee v. E.I. DuPont de Nemours & Co., 894 F.2d 755, 757 (5th Cir. 1990); Straub v. Western Union Tel. Co., 851 F.2d 1262, 1265-1266 (10th Cir. 1988); Northwest Administrators, Inc. v. B.V. B.R., Inc., 813 F.2d 223, 226-227 (9th Cir. 1987); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986)).

fiduciary of a plan.[42] In this case, obviously, the plaintiffs are potentially only participants or beneficiaries. For the purposes of this inquiry, "participant" is defined as "any employee or former employee of an employer."[43] "Employee" is cryptically defined within ERISA as "any individual employees by an employer."[44] A "beneficiary" is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."[45] In the instant case, the question has arisen whether or not Mr. Weaver is an employee or an independent contractor.[46] Thus, the key inquiries in this case (raised by the plaintiff) are: (1) whether Mr. Weaver is an employee of Rodrigues, so as to enable him to be a participant and have standing to sue, and to enable him to name Mrs. Weaver as a beneficiary; and (2) whether either of the plaintiffs have been designated as beneficiaries under the terms of the plan.

B. "Employees" Under ERISA

The question of whether a particular person is an "employee" (and therefore potentially a participant) under ERISA "is a question

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[42] 29 U.S.C. § 1145(a). See also Hermann Hospital v. MEBA Medical & Benefits Plan, 845 F.2d 1286 (5th Cir. 1988) (finding that only enumerated parties had standing to sue under ERISA).

[43] 29 U.S.C. § 1002(7)-

[44] 29 U.S.C. § 1002(6).

[45] 29 U.S.C- § 1002(8).

[46] The plaintiffs argue that Weaver is an independent contractor, while the defendants argue that he is an employee under ERISA.

of law involving the interpretation of ERISA."[47] In deciding this question of law, the Court is constrained to apply the federal common law of agency.[48] The courts have listed a number of factors to consider in this inquiry, listed below (followed by analysis of the instant facts):

1. "the employer's right to control the manner and means by which the work product is accomplished:"[49] in this case, Mr. Weaver worked felling timber in certain tracts of land designated to him by Rodrigues. Rodrigues had a number of "saw hands," and each would receive an assignment of what portion of land upon which they were to cut timber. Rodrigues told Mr. Weaver the dates upon which he would need to work and the time to be at work.[50] Nevertheless, Mr. Weaver (and the other saw hands employed by Rodrigues) made the decisions as to when, where, and how to cut the timber within the tract without input from Rodrigues.[51] Thus, although Rodrigues made the decisions as to which tracts to cut, the manner and means regarding the execution of the job were decided by Weaver.

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[47] Penn v. Howe-Baker Enqineers, Inc., 898 F.2d 1096, 1101 (5th Cir. 1990).

[48] Id. at 1101-1102.

[49] Id. at 1102 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752 (1989) (citations omitted)).

[50] Defendants' Second Supp. Brief in Supp. of Resp. to Pl. Mot. to Remand P. 4.

[51] Pl. Supp. Brief and Evid. in Support of Pl. Mot. to Remand Ex. "B" PP. 124-127.

2. "the skill required:"[52] the parties do not directly address this issue, though it appears that a specialized knowledge of tree cutting would be required for the type of work performed by Mr. Weaver.

3. "the source of the instrumentalities and tools:"[53] Mr. Weaver supplied his own tools and his own way to work.[54]

4. "the location of the work:"[55] the location of the work differed, according to the tract of land which would needed to be cut.

5. "the duration of the relationship between the parties:"[56] Apparently, although Mr. Weaver worked exclusively for Rodrigues, he only worked a few months before he was allegedly injured.[57]

6. "whether the hiring party has the right to assign additional projects to the hired party:"[58] Rodrigues would assign tracts of forest for Mr. Weaver to cut,

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[52] See note 4 9, supra.

[53] *Id.*

[54] Pl. Supp. Brief and Evid. in Supp. of Mot. to Remand Ex. "A" P. 19.

[55] See note 49, supra.

[56] *Id.*

[57] Defendants Second Supp. Brief in Supp. of Resp. to Pl. Mot. to Remand P. 27. The Court would note that the parties themselves defined Mr. Weaver's status as subcontractor and not as employee. (Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "A" PP. 18-20; Ex. "B" P. 123.)

[58] See note 4 9, supra.

and would assign new projects, or tracts, when the previous tract was complete.[59]

7. "the extent of the hired party's discretion over when and how long to work:"[60] this factor was not directly addressed by the parties, but it appears that Mr. Weaver would work full time until a particular tract was cleared, then would move to a new tract as assigned by Rodrigues.

8. "the method of payment:"[61] Mr. Weaver was paid by the load, i.e., per ton of wood cut, as were all the saw hands paid by Rodrigues.[62]

9. "the hired party's role in hiring and paying assistants:"[63] Mr. Weaver hired his son as an assistant, and thus it may be inferred that he had the responsibility and capacity to do so.[64]

10. "whether the work is part of the regular business of the hiring party:"[65] Rodrigues was in the business of cutting and hauling lumber, and thus the type of work Mr. Weaver was doing was part of Rodrigues's regular business.

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[59] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" P. 125.

[60] See note 49, supra.

[61] *Id.*

[62] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" P. 25.

[63] See note 49, supra.

[64] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" PP. 33-34.

[65] See note 49, supra.

11. "whether the hiring party is in business:"[66] Mr. Rodrigues was in the business of logging, as stated above.

12. "the provision of employee benefits:"[67] apparently, the only benefits provided were accident and disability insurance, through the Employer's plan in question.[68]

13. "the tax treatment of the hired party:"[69] Rodrigues did not withhold money from Mr. Weaver's payment for Social Security or federal income tax.[70] As a subcontractor, Mr. Weaver was responsible for paying any federal taxes due upon his payments from Rodrigues.[71]

After careful consideration of the above factors, the Court finds that Mr. Weaver was an independent contractor, and not an common law. Although certain of the above factors weigh in favor of employee status, others (especially Mr. Weaver's right to control the details of his work, provision of his own tools and means of transportation, the skill required of Mr. Weaver, the ability to hire his own assistants, the payment of his own Social Security and federal income tax, the method of payment, and the minimal benefits provided) weigh heavily in favor of independent contractor status. Because the definition of the term "participant" is based upon the party being an employee, Mr. Weaver cannot qualify as a participant within the meaning of ERISA. In light of this, the Court finds that Mr. Weaver is without standing to sue as a participant under ERISA, and cannot designate

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[66] *Id.*

[67] *Id.*

[68] Affid. of Roel Nabors, president of Employer's (stating that Mr. Weaver was on Rodrigues's payroll and thus, under the terms of the plan, was a covered employee).

[69] See note 49, supra.

[70] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "A" P. 18.

[71] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" P. 124.

his wife as a beneficiary.

C. Beneficiary Status

Even if Mr. Weaver does not qualify as a participant based upon the above finding that he was not an employee, under ERISA he and Mrs. Weaver may still qualify as beneficiaries if they are designated by the Southeastern Lumbermen's Association Employee Benefit Plan as such.[72] The parties in this case agree that the plan does not designate either of the plaintiffs as beneficiaries,[73] and thus the plaintiffs are without standing to sue in this case based upon ERISA.

V. DISPOSITION OF THE STATE LAW CLAIMS

Because only state-law claims have survived preemption in this case, and because the plaintiffs are without standing to sue under ERISA, the Court must determine whether to remand the case to the state court from which it was removed or to retain jurisdiction over the state law claims.[74] The removal statute provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall

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[72] 29 U.S.C. § 1002(8).

[73] Pl. Resp. Brief in Compliance with the Court's Order PP. 4-5. The only coverage in the Employer's plan is provided for "covered employees," a term which is defined as "a full-time employee (an Employee which works an average of at least 1 hours or more per week) of a Participating Employer." (Resp. to Pl. Mot. to Remand Ex. "A" P. 3.) Thus, neither Mr. Weaver nor Mrs. Weaver could have status as a named beneficiary aside from an employee status.

[74] The parties have briefed the issue of the correct course of action to take if the plaintiffs were found to be without standing. Apparently, however, none of the parties anticipated that a state law cause of action might survive preemption, but that the plaintiffs would be without standing to bring an ERISA cause of action, thus leading to the instant quandary.

be remanded."[75] In light of this statute, the Court is constrained to remand the plaintiffs' negligence cause of action to state court for disposition.[76]

V. CONCLUSION

In the Plaintiffs' Motion to Remand, the Court has been faced with four principal questions: (1) whether the Court has subject matter jurisdiction over this case (i.e., whether the insurance plan involved is governed by ERISA); (2) whether, if the Court does have subject matter jurisdiction, any of the plaintiffs' claims preempted by ERISA; (3) whether, if any of the plaintiffs' claims are preempted, the plaintiffs within the class of persons or entities entitled to bring an action under ERISA; and (4) the proper disposition of the case based upon the above findings. Having found that the insurance plan involved is an ERISA plan, the Court has determined that it does have jurisdiction over this case and thus that it was properly removed. Further, The Court finds that the bulk of the plaintiffs' claims are related to an employee welfare benefit plan, and thus preempted by the terms of ERISA. This finding, however, is without much force, as the Court further finds that the plaintiffs have no standing to bring an ERISA claim, and thus that the ERISA cause of action must be dismissed. This dismissal thus deprives the Court of subject matter jurisdiction, and requires that the remaining state law negligence, gross negligence and dependent attorneys' fees causes of action be remanded. It is, therefore,

ORDERED that all of the plaintiffs' claims (except those alleging negligence, gross negligence and attorney's fees in relation to the alleged failure of Rodrigues to provide a safe place to work and adequate equipment) are DISMISSED WITH PREJUDICE, as they are preempted by ERISA and the plaintiffs lack standing to sue under that statute. It is,

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[75] 28 U.S.C. § 1447(c) (in pertinent part). See International Primate Protection League v. Tulane Educ. Fund, 111 S.Ct. 1700, 1709-1710 (1991) (citing terms of § 1447(c) to hold that remand was required where district court was without jurisdiction and case was improperly removed); Estate of Rains v. Dinges, 769 F.Supp. 353, 354 (D.Kan. 1991) (court held pursuant to § 1447(c) that case had to be remanded where all federal question claims had been resolved).

[76] In remanding this action, the Court states no opinion as to the viability of the plaintiffs' non-preempted state law claims.

further,

ORDERED that the Plaintiffs' Motion to Remand is GRANTED. It is, further,

ORDERED that this case is REMANDED to the District Court of Tyler County, Texas for further proceedings, due to lack of subject matter jurisdiction in this court and pursuant to 28 U.S.C. § 1447(c). It is, further,

ORDERED that all pending motions aside from the Plaintiffs' Motion to Remand are denied.

SIGNED this 27th this day of January, 1993.

/S/ William M. Steger
UNITED STATES
DISTRICT JUDGE